Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ROBERT KRILICH, PETITIONER

v.

UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PHILIP W. SANDLER
Counsel of Record
SANDLER & ASSOCIATES
Two Mid America Plaza
Suite 800
Oakbrook Terrace, IL 60181
(312) 346-1122

CURRY & TAYLOR WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

QUESTION PRESENTED

Whether, absent extraordinary circumstances, a district court lacks subject-matter jurisdiction to entertain a Section 2255 motion while a petitioner's direct appeal is pending?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert R. Krilich, Sr., petitions for a writ of certiorari to review the judgment of the Seventh Circuit in this case.

OPINIONS BELOW

The district court dismissed petitioner's 28 U.S.C. § 2255 motion to correct, vacate, or set aside his sentence in an unpublished order, pet. app. 1a-3a, and subsequently denied his request for a Certificate of Appealability ("COA") in an unpublished order. *Id.* 4a-7a. The court of appeals denied a COA in an unpublished order. *Id.* 8a-9a.

JURISDICTION

The court of appeals judgment was entered on May 18, 2005. A timely petition for rehearing was denied on October 28, 2005. Pet. App. 10a-11a. On January 16, 2006, Justice Stevens extended the time to file this petition to and including March 27, 2006. App. No. 05A640 Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Title 28, Section 2255 of the United States Code provides, in pertinent part:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of-
>
> (1) the date on which the judgment of conviction becomes final;
>
> *****
>
> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain-
>
> (1) Newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

STATEMENT

Petitioner was convicted of racketeering and of making false statements to a bank. He was sentenced three times. Under the version of the Sentencing Guidelines in effect at the time of petitioner's conduct, his first sentence was calculated based on the amount of the "bribe or the benefit received, or to be received, in return for the bribe." U.S.S.G. § 2C1.1(b)(2)(A) (1990 ver.). The district court sentenced petitioner to 64 months' imprisonment based on the judge's finding that the benefit to petitioner from the offense was between $5 and

$10 million.

Petitioner appealed his convictions and the government cross-appealed the sentence. The court of appeals affirmed petitioner's convictions, but remanded for resentencing on the ground that the district court's calculation of petitioner's gain was too vague. *United States v. Krilich*, 159 F.3d 1020, 1031 (7th Cir. 1998) (*Krilich I*). This Court denied certiorari on October 4, 1999, regarding issues related to his conviction. *United States v. Krilich*, 528 U.S. 810 (1999). Thereafter, petitioner was sentenced for a second time ("first resentencing") on November 1, 2000, to 87 months' incarceration. Pet. App. 15a. On July 16, 2001, on direct appeal of petitioner's first resentencing, the appellate court again vacated his sentence and remanded the case for a second resentencing. *United States v. Krilich*, 257 F.3d 689, 694 (7th Cir. 2001) (*Krilich II*). Upon remand, after a contested sentencing proceeding involving expert testimony, petitioner was sentenced for a third time ("second resentencing") to 135 months' incarceration. Pet. App. 33a. The judgment of conviction became final when the Supreme Court denied his Petition for a Writ of Certiorari on October 14, 2003. *United States v. Krilich*, 540 U.S. 946 (2003); and Government's Jurisdictional Memorandum at 2, 3/2/05). Pet. App. 12a-14a.

The petitioner filed three motions under Section 2255: in 2000, he challenged his conviction (the "conviction 2255"): in 2002, he challenged issues that first arose on remand (the "first sentencing 2255"). Petitioner could not have included the claims set forth in the first sentencing 2255 in his earlier-filed conviction 2255 because those claims did not arise for purposes of Section 2255 review until after the district court had already decided the conviction 2255. Notwithstanding that the district court, the government and petitioner all agreed

this proceeding was a continuation of the initial Section 2255 motion because it only addressed issues that first arose at resentencing, the court of appeals held that this first sentencing 2255 was a prohibited "second or successive" habeas petition and dismissed it for want of jurisdiction. Pet. App. 12a-14a, 41a-43a. Within one-year after the judgment of conviction became final, on October 14, 2004, petitioner filed a third Section 2255 motion again challenging issues that first arose at resentencing (the "second sentencing 2255").[1] Since the first sentencing 2255 motion had been dismissed for want of jurisdiction, he argued in the second sentencing 2255 that he had no previous opportunity to raise issues that first arose at resentencing in an initial Section 2255 motion. Nonetheless, the district court dismissed the second sentencing 2255 motion as a successive petition. *Id.* 34a-37a. The appellate court denied a COA. *Id.* 8a-9a.

1. Rules Governing the Submission of Section 2255 Motions.

Congress established in 28 U.S.C. § 2255 a procedure for federal prisoners to collaterally attack their convictions and sentences. In order to ensure that courts are not unnecessarily called upon to decide Section 2255 motions, a prisoner must first pursue to its conclusion any

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1 In the § 2255 motion filed October 14, 2004, petitioner raised a *Booker/Blakely* claim and by extension an *Appendri* claim. Pet. App.1a-7a. See *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004) and *Apprendi v. New* Jersey, 530 U.S. 466 (2000). Currently pending before this Court is *Cunningham v. The State of California, cert. granted*, 2006 U.S. LEXIS 1136 (U.S. Feb. 21, 2006) (No. 05-6551). Should the decision in *Cunningham* impact petitioner's case, it is respectfully requested that he be entitled to § 2255 relief based on that holding.